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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SCOTT HOWARD, Plaintiff and Appellant, v. MISSION SOARING, LLC, et al., Defendants and Respondents.	H043759 (San Benito County Super. Ct. No. CU1500061)

After plaintiff Scott Howard was injured while hang gliding, he brought an action for negligence against Mission Soaring, LLC (Mission Soaring), Patrick Denevan, and Harold Johnson (collectively, defendants) for injuries sustained in a hang gliding crash. Denevan, the owner of Mission Soaring, conducted plaintiff's initial orientation. Johnson was an instructor at Mission Soaring and instructed plaintiff on the day of the crash. The trial court granted defendants' motion for summary judgment and entered judgment in their favor. On appeal, plaintiff contends that the trial court erred in granting summary judgment. We agree that triable issues of material fact remain unresolved and that plaintiff successfully rebutted defendants' assertion of express and primary assumption of risk. Accordingly, we reverse the judgment.

I. Standard of Review

We review the trial court's summary judgment ruling de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) In performing our independent review, we apply the same three-step process as the trial court. "Because summary judgment is defined by the material allegations in the pleadings, we first look to the pleadings to identify the elements of the causes of action for which relief is sought." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 (*Baptist*).)

"We then examine the moving party's motion, including the evidence offered in support of the motion." (*Baptist*, *supra*, 143 Cal.App.4th at p. 159.) When the defendant moves for summary judgment, the defendant bears both the initial burden of production and the burden of persuasion. The "initial burden of production [requires the defendant] to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) The burden of persuasion requires the defendant to show that there are no triable issues of material fact and that the defendant is entitled to judgment as a matter of law. (*Id.* at p. 850.)

In determining whether the parties have met their respective burdens, the court must "'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at p. 843, fn. omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

II. Procedural and Factual Background

A. Complaint

In May 2015, plaintiff filed a complaint alleging a single negligence cause of action. In his complaint, plaintiff contended that defendants owed him a reasonable duty of care in maintaining the equipment used in hang gliding and in selecting, hiring, and supervising employees of the hang gliding company. In that respect, plaintiff argued that defendants breached that duty by failing to keep and maintain the equipment in a safe operable condition and by "increase[ing] the risk of injury . . . beyond the inherent risks associated with hang gliding."

Plaintiff alleged the following facts. In November 2013, plaintiff entered defendants' property to hang glide. Plaintiff had purchased 20 "tows" from defendants. A tow consisted of attaching the hang glider to a cable which was operated by a hydraulic winch system. The tow cable was operated mechanically to pull the hang glider into the sky. The hang glider was attached to the tow cable by a ring and release pin. On one of plaintiff's tows, plaintiff attempted to release himself but the pin failed to release and the hang glider remained attached to the tow cable. Plaintiff tried several times to release himself but was unable to do so. The auto release mechanism did not release plaintiff because it had been disengaged. Plaintiff crashed to the ground, resulting in serious injuries.

B. Summary Judgment Motion

Defendants brought a motion for summary judgment. They argued that plaintiff's cause of action was barred based on the express assumption of risk and primary assumption of risk doctrines. Specifically, with respect to express assumption of risk, defendants pointed to the "Release, Waiver and Assumption of Risk Agreement" signed by plaintiff, in which he affirmed: "I VOLUNTARILY ASSUME ALL RISKS, KNOWN AND UNKNOWN, OF SPORT INJURIES, HOWEVER CAUSED EVEN IF

CAUSED IN WHOLE OR IN PART BY THE ACTION, INACTION, OR NEGLIGENCE (WHETHER PASSIVE OR ACTIVE) OF THE RELEASED PARTIES, TO THE EXTENT ALLOWED BY LAW." Defendants asserted that because plaintiff read, understood, and signed the agreement, he had released defendants from any claim, including one for negligence, due to injuries received while hang gliding.

In addition, with respect to primary assumption of risk, defendants argued that the sport of hang gliding includes inherent risks and that plaintiff's injuries resulted from those inherent risks. At most, defendants argued, they had a limited duty not to increase the risks inherent in the sport. Defendants contended there was no evidence they had breached that limited duty. Accordingly, defendants argued that in the absence of any duty on their part, plaintiff's negligence claim failed as a matter of law.

To support their summary judgment motion, defendants submitted plaintiff's deposition testimony to establish the following facts. When deciding whether to start hang gliding, plaintiff researched the sport of hang gliding. He was generally aware of the risks involved. Denevan conducted plaintiff's initial hang gliding orientation. The orientation consisted of a video about hang gliding, an overview of the lessons offered, and an explanation of the different pilot ratings. The next day, plaintiff began to take his first hang gliding lessons, which consisted of basic instruction and lasted four to five hours. After approximately 13 lessons, plaintiff was introduced to the tow machine. Plaintiff eventually achieved the "Hang 1" pilot designation. Thereafter, plaintiff purchased a hang glider, a hang gliding harness, a tow release, and a parachute.

Plaintiff explained that one of the safety features of a hang glider was an auto release mechanism. The auto release feature would cause the hang glider to disconnect from the tow system when certain height or directional limits were reached. Plaintiff testified that on the day of the accident, Johnson noted that the auto release was disengaging the tow cable before plaintiff reached the prescribed release point. According to plaintiff, Johnson advised that the auto release could be lengthened, which

would "basically disable it." Johnson also advised plaintiff that he could instead disconnect the auto release when it got closer to the release point. On the day of the accident, Johnson instructed plaintiff to disconnect the auto release. Per that instruction, plaintiff disconnected the auto release before reaching his release point. After reaching the prescribed height, plaintiff attempted to manually release the tow cable. Plaintiff testified that he pulled multiple times on the release but it failed to disconnect. Plaintiff worried that he would soon veer too far on the tow line, be pulled down, and lose control of the hang glider. Plaintiff removed both hands from the control bar to pull on the release mechanism. Having removed both hands from the control bar, plaintiff lost control of the hang glider and crashed.

C. Plaintiff's Opposition

Plaintiff filed an opposition to the motion for summary judgment. He argued that defendants had not met their initial burdens of production and persuasion. Specifically, with respect to the burden of production, plaintiff argued that defendants had not "conclusively proven that Plaintiff cannot establish a cause of action for gross negligence." In that respect, plaintiff maintained that the issue of whether defendants' conduct constituted gross negligence remained a question of fact for the jury to consider. Plaintiff noted that he was a beginner pilot, that plaintiff had informed Johnson that he was having trouble with his release mechanism, and that Johnson did not follow up on or rectify the release issues. Plaintiff also noted that he informed Denevan on the morning of the incident that he was having release problems. Finally, plaintiff pointed to the fact that Johnson had instructed him to disconnect the auto release safety mechanism. Plaintiff further pointed to Denevan's deposition testimony, in which Denevan stated that he would never instruct a pilot to disengage the auto release and that it was a violation of company policy to instruct a pilot to do so.

D. Defendants' Reply

Defendants argued that plaintiff essentially admitted all of defendants' undisputed facts in support of summary judgment. In addition, defendants asserted that plaintiff's argument that the auto release device caused the accident was not supported by any admissible evidence. Finally, defendants argued that plaintiff failed to establish, through expert testimony, whether defendants' conduct fell below any standard of care or otherwise increased the risks inherent to hang gliding.

E. The Trial Court's Ruling

After hearing argument on the motion, the trial court granted defendants' motion for summary judgment. In pertinent part, the trial court found that the negligence claim was barred by the express assumption of risk and primary assumption of risk doctrines.

III. Discussion

Plaintiff argues that the primary assumption of risk doctrine should not apply in this case because defendants increased the inherent risks associated with hang gliding. He also argues that the express assumption of risk doctrine should not apply because the same conduct that increased the risks inherent in the sport also constituted gross negligence.

A. Legal Standard

If a defendant moves for summary judgment on the ground of primary assumption of risk, "'"he or she has the burden of establishing the plaintiff's primary assumption of the risk by demonstrating that the defendant owed no legal duty to the plaintiff to prevent the harm of which the plaintiff complains." [Citation.]'" (*Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 826.) "[W]hen the plaintiff claims the defendant's conduct increased the inherent risks of a sport, summary judgment on

primary assumption of risk grounds is unavailable unless the defendant disproves the theory or establishes a lack of causation. [Citations.]" (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 740 (*Huff*).)

"Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others. [Citations.]" (*Shin v. Ahn* (2007) 42 Cal.4th 482, 488 (*Shin*).) Under the primary assumption of risk doctrine, "the defendant owes no duty to protect a plaintiff from a particular risk that the plaintiff is construed to have assumed. In the sports context, the plaintiff is deemed to have assumed those risks inherent in the sport in which plaintiff chooses to participate." (*Id.* at p. 498.) Where the doctrine of primary assumption of risk applies, the defendant owes the plaintiff "only the duty not to act so as to *increase* the risk of injury over that inherent in the activity. [Citations.]" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 (*Nalwa*).) This is a "limited duty of care . . . to refrain from intentionally injuring . . . another or engaging in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' [Citation.]" (*Shin, supra*, 42 Cal.4th at pp. 489-490.) This is "'a duty not to increase the risks inherent in the sport, not a duty to decrease the risks.' [Citations.]" (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166.)

In determining whether a defendant breached this limited duty, the nature of the sport and the totality of the circumstances surrounding the defendant's conduct and the plaintiff's injury must be considered. (*Shin*, *supra*, 42 Cal.4th at pp. 499-500; *Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1495 (*Cohen*).) Although a trial court may "not rely upon expert opinion testimony to establish the legal question of duty," the court may receive "'expert testimony on the customary practices in an arena of esoteric activity for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct.' [Citations.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1017-1018 (*Kahn*).) Questions of fact may arise as to whether a defendant breached a limited duty of care to a plaintiff by engaging in conduct that is

"'so reckless as to be totally outside the range of the ordinary activity . . . .'" (*Shin*, *supra*, 42 Cal.4th at p. 501.) In such a case, summary judgment may properly be denied. (*Id.* at p. 488; *Kahn*, at pp. 996-997.)

As for express assumption of risk, a release of liability for future gross negligence is generally unenforceable as a matter of public policy. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750-751, 777 (*City of Santa Barbara*).) Because of this, the distinction between ordinary and gross negligence is important. Ordinary negligence "consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." (*Id.* at pp. 753-754.) In contrast, gross negligence consists of "a '"'want of even scant care'"' or '"'an extreme departure from the ordinary standard of conduct.'"' [Citations.]" (*Id.* at p. 754.) "'"'[G]ross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind."'" (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881.) Gross negligence "'connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results . . . .'" (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 857.)

B. Analysis

In this case, although defendants met their initial burden of production and persuasion, we conclude that plaintiff ultimately carried his "burden of production . . . to make a prima facie showing of the existence of a triable issue of material fact." (See *Aguilar*, *supra*, 25 Cal.4th at p. 850.) Specifically, the evidence presented in the moving and opposition papers shows the existence of a triable issue of fact with respect to whether defendants increased the inherent risks of hang gliding, thus precluding summary judgment based on primary assumption of risk. Moreover, the same evidence also demonstrates a triable issue of fact with respect to whether that same conduct constituted

gross negligence, thus precluding summary judgment based on express assumption of risk.

We first address primary assumption of risk. In the trial court, defendants disputed that they increased the inherent risks of hang gliding principally by disputing causation—that there was "no admissible evidence that the auto release mechanism had anything to do with plaintiff's accident." On the contrary, plaintiff testified to the basic mechanics of the auto release mechanism, as did Denevan. From their descriptions of the auto release, a rational jury could infer that disconnecting the auto release was related to plaintiff's accident, insofar as disengaging the auto release forced plaintiff to rely solely on the manual release. Plaintiff testified that just "prior to reaching the release point, when the auto release would become tight enough that it was about to release [him]" he would disconnect the auto release safety device to attain his desired release height. Plaintiff said he did so at the direction of his instructor. For his part, Denevan described the auto release as a safety mechanism designed to release the pilot if the manual release system failed. Denevan also noted that under no circumstances would he direct a pilot to disengage the auto release, that disengaging the auto release would be "foolish," and that instructing a pilot to disengage the auto release would be a violation of company policy.

Considering all the evidence in the light most favorable to plaintiff, defendants did not meet their burden of establishing a lack of causation. (See *Aguilar*, *supra*, 25 Cal.4th at p. 843; *Huff*, *supra*, 138 Cal.App.4th at p. 740 [summary judgment on primary assumption of risk inappropriate where plaintiff claims defendant's conduct increased risk unless defendant disproves theory or lack of causation].) Drawing all reasonable inferences from the evidence, a reasonable jury could conclude that defendants violated their duty to not "*increase* the risk of injury" beyond "that inherent in the activity. [Citations.]" (See *Nalwa*, *supra*, 55 Cal.4th at p. 1154.) In that respect, as explained below, the same set of facts also raises a triable issue of fact as to whether defendants' conduct constituted gross negligence.

In *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 554 (*Jimenez*), the plaintiff argued that summary judgment based on express assumption of liability was inappropriate because of the existence of a fact question as to whether 24 Hour Fitness was grossly negligent in placing exercise equipment too close together. (*Id.* at pp. 549-550.) The plaintiff in *Jimenez* had been injured when she fell from a treadmill at a 24 Hour Fitness facility; she had also executed a liability release with an express assumption of risk as to injuries sustained at 24 Hour Fitness facilities. (*Ibid.*) The treadmill manufacturer provided for a minimum amount of clearance between treadmills for user safety. (*Ibid.*) The Court of Appeal held that summary judgment was improperly granted: "In our view, based on the evidence plaintiffs presented, a jury could reasonably find that (1) it is standard practice in the industry to provide a minimum six-foot safety zone behind treadmills, based on the owner's manual, assembly guide, and Waldon's declaration as an expert; (2) 24 Hour did not provide this minimum six-foot safety zone . . . ; and (3) the failure to provide *the minimum* safety zone was an extreme departure from the ordinary standard of conduct, as implied in Waldon's declaration." (*Id.* at p. 557.)

Jimenez is instructive in the instant case. Here, as previously noted, plaintiff produced testimony from Denevan that there was never a circumstance where a pilot should disengage the auto release and he would never instruct a pilot to do so. Plaintiff further produced testimony that he was instructed to disconnect the auto release on his hang glider and that he did so in accordance with those instructions. Finally, plaintiff testified that because he disconnected his auto release, he was forced to rely exclusively on the manual release to disengage from the tow cable. Based on the foregoing, as in *Jimenez*, a jury could reasonably find: (1) Denevan's testimony established a standard that under no circumstances should the auto release be disengaged; (2) the instruction provided to plaintiff did not meet that standard; and (3) the instructed use of the auto

release was an extreme departure from the ordinary standard of conduct, as expressed in Denevan's deposition testimony. (See *Jimenez, supra*, 237 Cal.App.4th at p. 557.)

Accordingly, there are disputed factual issues that need to be resolved regarding whether disabling the auto release constituted "'"'an extreme departure from the ordinary standard of conduct.'"' [Citations.]" (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754.) For example, in his deposition testimony, Denevan indicated that plaintiff disconnected the auto release at "[n]o one's direction." Plaintiff's testimony indicated otherwise. Considering the conflicting testimony, a trier of fact could reasonably conclude that defendants exercised scant care or demonstrated passivity and indifference toward results. (See *id.* at pp. 753-754.)

III. Disposition

The judgment is reversed. Plaintiff shall recover his appellate costs.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.